Malayan Banking Bhd v Mohd Salleh bin Hj Mohd Nor & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–855 OF 2000
ABDUL MALIK ISHAK J
1 JANUARY 2006

Civil Procedure — Summary judgment — Triable issues — Claim on overdraft facilities — Failure to aver that loan was fully released to defendants — Non production of bank's audited statement of accounts, whether presumption of adverse inference invoked — Whether plaintiff had proved that copies of audited statement of accounts were sent to defendants — Whether unaudited statement of account sufficient to prove amount due — Whether summary judgment should be granted

The plaintiff's claim against the defendants was for a combined sum of RM570,708.49 based on two overdraft facilities allegedly granted to the defendants, ie: (1) an overdraft facility of RM350,000 which was based on a letter of offer dated 26 May 1995 ('the overdraft facility'); and (2) a second temporary overdraft of RM100,000 which was allegedly granted to the defendants at their request ('the temporary overdraft facility'). The plaintiff obtained summary judgment against the defendants. Being aggrieved, the defendants appealed. The issue was whether there were factual controversies amounting to triable issues which must necessitate a full trial to be ordered.

Held, allowing the defendants' appeal with costs and granting an unconditional leave to defend:

(1) In the statement of claim, the plaintiff did not aver that the sum of RM350,000 was ever released to the defendants. But the plaintiff in its affidavit deposed by Mohd Razali in encl 11 affirmed for the very first time that the sum of RM350,000 was released fully into the defendants' accounts. Pure and simple, the plaintiff was improving its statement of claim by way of an affidavit evidence. This ought not to be done and it could not be condoned (see para 13).

(2) The plaintiff too had failed to produce its audited statement of accounts to the defendants in order to show that the sum of RM350,000 was credited fully into the defendants' accounts. Such failure would give rise to the presumption that if the plaintiff had produced its audited statement of accounts, it would not be favourable to the plaintiff (see para 13).

(3) There was also the failure on the part of the plaintiff to prove by way of an evidence that the plaintiff had indeed sent copies of its audited statement of accounts to the defendants and although the defendants had contended that they had never received such statement of accounts, the plaintiff merely adopted a nonchalant attitude and merely replied that it had sent the said statement of accounts (see para 14).

(4) Although it was submitted by the plaintiff that it had exhibited its statement of accounts, the statement merely stated that the sum of RM570,708.49 was due to the plaintiff from the defendants. That kind of statement of accounts would not be sufficient. It failed to state the details of the accounts and it did not show how the sum of RM570,708.49 was due and owing from the defendants to the plaintiff. It also failed to state and itemise the account numbers of the defendants' accounts. It was an unaudited statement of accounts. With all these infirmities, the plaintiff could not rely on its purported statement of accounts to support its claim (see para 15).

(5) In regard to the temporary overdraft facility, the matter should proceed for trial. The plaintiff had not adduced any proof that the sum of RM100,000 was ever released to the defendants and this fact was certainly crucial to the plaintiff's claim. The plaintiff too had failed to produce its audited statement of accounts in order to show that the sum of RM100,000 was in fact credited to the defendants' accounts. It must be borne in mind that the purported statement of accounts produced by the plaintiff to show that the sum of RM570,708.49 was allegedly outstanding was not sufficient to prove that the defendants owed the plaintiff the sum of RM100,000 as alleged (see para 18).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah untuk jumlah gabungan RM570,708.49 berdasarkan dua kemudahan kewangan yang dikatakan telah diberikan kepada defendan-defendan, iaitu (1) kemudahan kewangan RM350,000 berdasarkan surat tawaran bertarikh 26 Mei 1995 ('kemudahan kewangan'); dan (2) overdraf kedua sementara RM100,000 yang dikatakan telah diberikan kepada defendan-defendan atas permintaan mereka ('kemudahan overdraf sementara'). Plaintif telah memperoleh penghakiman terus terhadap defendan-defendan. Berasa terkilan, defendan-defendan telah merayu. Persoalannya adalah sama ada terdapat kontroversi berdasarkan fakta yang membentuk persoalan yang perlu dibicarakan yang memerlukan satu perbicaraan penuh diperintahkan.]

Diputuskan, membenarkan rayuan defendan-defendan dengan kos dan memberikan kebenaran tanpa syarat untuk membela:

(1) Dalam penyataan tuntutan, plaintif tidak menegaskan bahawa jumlah RM350,000 telah dimasukkan kesemuanya dalam akaun defendan-defendan. Plaintif telah memperbaiki penyataan tuntutannya melalui satu keterangan afidavit. Ini sepatutnya tidak berlaku dan tidak boleh dibiarkan (lihat perenggan 13).

(2) Plaintif juga telah gagal untuk mengemukakan penyata akaunnya yang telah diaudit kepada defendan-defendan untuk menunjukkan bahawa jumlah RM350,000 telah dimasukkan kesemuanya ke dalam akaun defendan-defendan. Kegagalan sedemikian menimbulkan andaian bahawa jika plaintif telah mengemukakan penyata akaunnya yang telah diaudit, ia tidak berpihak kepada plaintif (lihat perenggan 13).

(3) Terdapat juga kegagalan di pihak plaintif untuk membuktikan melalui keterangan bahawa plaintif sememangnya telah menghantar salinan penyata akaunnya yang telah diaudit kepada defendan-defendan dan meskipun defendan-defendan berhujah bahawa mereka tidak pernah menerima penyata akaun sedemikian, plaintif hanya menunjukkan sikap acuh tidak acuh dan hanya menjawab bahawa ia telah menghantar penyata akaun tersebut (lihat perenggan 14).

(4) Meskipun telah dihujahkan oleh plaintif bahawa ia telah mengekshibitkan penyata akaunnya, penyataan itu hanya menyatakan jumlah RM570,708.49 yang perlu dibayar kepada plaintif daripada defendan-defendan. Penyata akaun sedemikian tidak memadai. Ia gagal untuk menyatakan bahawa butiran akaun itu dan ia tidak menunjukkan bagaimana jumlah RM570,708.49 itu perlu dibayar dan tertunggak daripada defendan-defendan kepada plaintif. Ia juga gagal menyatakan dan memperincikan nombor-nombor item akaun defendan-defendan. Ia penyata akaun yang tidak diaudit. Dengan semua kelemahan tersebut, plaintif tidak boleh bergantung kepada penyata akaunnya untuk menyokong tuntutannya (lihat perenggan 15).

(5) Berhubung kemudahan overdraf sementara itu, perkara tersebut patut dibicarakan. Plaintif tidak mengemukakan apa-apa bukti bahawa jumlah RM100,000 telah dilepaskan kepada defendan-defendan dan fakta ini penting untuk tuntutan plaintif. Plaintif juga gagal mengemukakan penyata akaunnya yang telah diaudit bagi tujuan menunjukkan bahawa jumlah RM100,000 sememangnya telah dikreditkan ke akaun defendan-defendan. Ia harus diingat bahawa penyata akaun yang dikemukakan oleh plaintif untuk menunjukkan bahawa jumlah RM570,708.49 adalah baki yang dikatakan itu tidak memadai untuk membuktikan bahawa defendan-defendan berhutang kepada plaintif sejumlah RM100,000 seperti yang dikatakan (lihat perenggan 18).

Notes

For cases on triable issues, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 6540–6613.

Cases referred to

Atyam v Pedhitti A 1966 SC 629 (refd)
Baljit v S A 1976 SC 2273 (refd)
Bank of Commerce (M) Berhad v Tan Boon Soon @ Tan Po Lo (Trading As Messrs Syarikat Soon Tatt Trading) & Anor [1995] 1 CLJ 69 (refd)
Bihar Agents Ld v Union A 1960 P 111 (refd)
Dane v Mortgage Ins Corpn (1894) 1 QB 54 (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (refd)
Eushun Properties Sdn Bhd & Ors v MBF Finance Bhd [1992] 2 MLJ 137 (refd)
Gold Ores Reduction Co v Parr (1892) 2 QB 14 (refd)
Industrial & Commercial Bank Ltd v Li Soon Development Pte Ltd & Ors [1994] 1 SLR 471 (refd)
Lloyd's Banking Co v Ogle LR 1 E x D 262 (refd)
Lynde v Waithman (1895) 2AB 180
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183

Memphis Rogues Ltd v Skalbania (1982) 38 BCLR 193 (refd)
Mohamed Taib Haji Ibrahim & Anor v Perwira Habib Bank Malaysia Bhd [1987] 2 MLJ 723
Mohd Azam Shuja & Ors v United Malayan Banking Corp Bhd [1995] 1 MLJ 33
Multi-Purpose Bank Bhd v Maimoon binti Abdul Razak [1999] 6 MLJ 215 (refd)
Nassau Steam Press v Tyler (1894) 70 LT 376 (refd)
Ochse v Duncan (1887) 3 TLR 220 (refd)
Pillai v Dangali A 1942 R 52 (refd)
Ramdas Oil Mills v Union A 1977 SC 638 (refd)
Rangabati v United Bank A (1961) P 158 (refd)
Roberts v Plant (1895) 1 QB 597 (refd)
Robinson & Co v Lynes (1894) 2 QB 577 (refd)
Srichand v S (1967) SC 450 (refd)
Srinivasa v Venkatavarada 38 IA 129, 13 Bom LR 520 (refd)
Union v Khalilur A (1971) C 347 (refd)
United Malayan Banking Corp Bhd v Tan Kay Hock [1997] 3 MLJ 813 (refd)
United Overseas Bank Ltd v Mohamed Arif [1994] 2 SLR 296 (refd)
Williamson v Rover Cycle Co (1901) 2 IR 619 (refd)

Legislation referred to
Evidence Act 1950 s 114(g)
Rules of the Supreme Court 1957 O 14

Satish Vasudevan Nair (Gulam & Wong) for the plaintiff.
Thilagavathy Seenivasagam (Adrina bte Mohamed with her) (Shaharudin Sham) for the defendants.

Abdul Malik Ishak J:

INTRODUCTION

[1] The plaintiff obtained summary judgment against the defendants. Being aggrieved, the defendants filed a notice of appeal to the Judge in chambers as reflected in encl 14. There were numerous triable issues which can only be decided at the full trial and only after hearing the oral evidence of the witnesses. I allowed the defendants' appeal in encl 14 with costs and I gave an unconditional leave to defend. I too ordered the plaintiff to file Form 63. In an appeal of this nature, it is trite law that only one triable issue would be sufficient to decide the appeal in favour of the defendants.

[2] The usefulness of summary judgment can never be doubted. It is a means of disposing of cases which are virtually uncontested. If the plaintiff can prove its claim clearly and if the defendants are unable to set up a bona fide defence or raise an issue against the claim which ought to be tried, judgment should be given in favour of the plaintiff (*Roberts v Plant* (1895) 1 QB 597 (CA); *Robinson & Co v Lynes* (1894) 2 QB 577; *Dane v Mortgage Ins Corpn* (1894) 1 QB 54 (CA); and *Nassau Steam Press v Tyler* (1894) 70 LT 376).

[3] In contesting the summary judgment application, the defendants should show that they have a good defence to the claim on the merits. The defendants too should show that:

(a) a difficult point of law is involved; or

(b) a dispute as to the facts which ought to be tried exists; or

(c) any other circumstances showing reasonable grounds of a bona fide defence in favour of the defendants exist.

[4] The primary obligation remains on the defendants here to show that there is a triable issue or question or that there ought to be a trial for some other reason. In my judgment, the defendants have succeeded in doing so.

FACTS OF THE CASE

[5] The plaintiff's claim against the defendants was for a combined sum of RM570,708.49 as at 24 December 1999. This sum was said to be based on two overdraft facilities allegedly granted to the defendants and they may be stated as follows:

(a) an overdraft facility of RM350,000 which was based on a letter of offer dated 26 May 1995 ('the overdraft facility'); and

(b) a second temporary overdraft of RM100,000 which was allegedly granted to the defendants at their request ('the temporary overdraft facility').

[6] The sum total of both the overdraft facility and the temporary overdraft facility came up to RM450,000. But, as I said, the plaintiff sought for the lump sum of RM570,708.49 as at 24 December 1999.

[7] Evidence wise, the plaintiff has not furnished any details as to the actual amount allegedly due and owing under each of the overdraft facility and the temporary overdraft facility. The plaintiff too has failed to show how the defendants owed the sum of RM570,708.49 as at 24 December 1999 to the plaintiff (*Bank of Commerce (M) Berhad v Tan Boon Soon @ Tan Po Lo (Trading As Messrs Syarikat Soon Tatt Trading) & Anor* [1995] 1 CLJ 69).

TRIABLE ISSUES

[8] The overdraft facility was secured by a charge over the property held under HS(D)5215 Lot 29794 Mukim and Daerah of Kuala Lumpur bearing postal address at No 93, Lorong Zaaba, Taman Tun Dr Ismail 60000 Kuala Lumpur ('the said property'). The charge was registered on 14 July 1995. It was the contention of the plaintiff that the defendants had defaulted in the overdraft facility as well as the temporary overdraft facility. It was also the contention of the plaintiff that both the overdraft facility and the temporary overdraft facility were revoked by way of the plaintiff's solicitors letter dated 9 March 2000. It must be borne in mind that the

overdraft facility was merely an overdraft facility and this was so stated in the letter of offer dated 26 May 1995 and the charge that was registered on 14 July 1995. A

[9] I can certainly take judicial notice that there is a material difference between an overdraft facility and a term loan. In the former, the borrower is allowed to utilise the overdraft up to the present limit under the overdraft facility whereas for a term loan, a fixed pre-set amount is released to the borrower. B

[10] According to the case of *United Overseas Bank Ltd v Mohamed Arif* [1994] 2 SLR 296, once a bank agrees to grant a loan to a customer, the customer is legally entitled to enforce the agreement if the bank fails to disburse the loan. The customer, as an aggrieved party, is entitled to bring an action against the bank for breach of contract (*Eushun Properties Sdn Bhd & Ors v MBF Finance Bhd* [1992] 2 MLJ 137). And according to the case of *Mohd Azam Shuja & Ors v United Malayan Banking Corp Bhd* [1995] 1 MLJ 33, that upon disbursement of the loan to a customer, the funds would become the customer's own funds. C D

[11] Credit facilities offered by a bank to its customer come in two forms. One by way of an overdraft and the other is by way of a term loan. According to the case of *Industrial & Commercial Bank Ltd v Li Soon Development Pte Ltd & Ors* [1994] 1 SLR 471, if a customer breaches the terms of the overdraft by making withdrawals exceeding the overdraft limit, the overdraft is liable to be withdrawn by a bank. In sharp contrast, if the bank grants a term loan to its customer, the customer is entitled to assume that the loan will not be recalled by the bank until after the end of the term period. E

[12] In brief, these would be the differences between these two credit facilities. I shall now revert to the appeal at hand. In so far as the overdraft facility and the temporary overdraft facility were concerned, oral evidence must be led in open court to show the banking practices of the plaintiff's bank. In *Mohamed Taib Haji Ibrahim & Anor v Perwira Habib Bank Malaysia Bhd* [1987] 2 MLJ 723, the then Supreme Court was of the view that the differences between 'temporary' and 'continuing' overdrafts constituted triable issues which merited mature consideration. The same approach should be adopted to the facts of the present appeal. F G

[13] Here, the defendants have put the plaintiff to strict proof that a sum of RM350,000 was released to the defendants. It was therefore vital for the plaintiff to show proof that the sum of RM350,000 under the overdraft facility was ever released to the defendants. The defendants did not dispute the letter of offer but the defendants contended that the plaintiff was not entitled to the sum claimed under the overdraft facility. In the statement of claim, the plaintiff did not aver that the sum of RM350,000 was ever released to the defendants. But the plaintiff in its affidavit deposed by Mohd Razali in encl 11 affirmed for the very first time that the sum of RM350,000 was released fully into the defendants' accounts. Pure and simple, the plaintiff was improving its statement of claim by way of an affidavit evidence. This ought not to be done and it cannot be condoned (*Gold Ores Reduction Co v Parr* (1892) 2 QB 14). The plaintiff too has failed to produce its audited statement of accounts to the defendants in order to show that the sum of RM350,000 was credited H I

fully into the defendants' accounts. Such failure would give rise to the presumption that if the plaintiff had produced its audited statement of accounts, it would not be favourable to the plaintiff. Section 114(g) of the Evidence Act 1950 relates to the presumption raised from willful withholding of evidence and from spoliation, be it, destruction, mutilation or suppression or mutilation of evidence. It is generally in reference to the presumption from withholding available evidence (*Williamson v Rover Cycle Co* (1901) 2 IR 619; *Srichand v S* (1967) SC 450; *Union v Khalilur A* (1971) C 347; *Atyam v Pedhitti* A 1966 SC 629; *Baljit v S* A 1976 SC 2273; *Ramdas Oil Mills v Union* A 1977 SC 638; *Srinivasa v Venkatavarada* 38 IA 129, 13 Bom LR 520; *Pillai v Dangali* A 1942 R 52; *Rangabati v United Bank* A (1961) P 158; and *Bihar Agents Ld v Union* A 1960 P 111). I must vigorously apply s 114(g) of the Evidence Act 1950 against the plaintiff: *omnia praesumuntur contra spoliatorem*.

[14] There was also the failure on the part of the plaintiff to prove by way of an evidence that the plaintiff had indeed sent copies of its audited statement of accounts to the defendants and although the defendants had contended that they had never received such statement of accounts, the plaintiff merely adopted a nonchalant attitude and merely replied that it had sent the said statement of accounts. If indeed the plaintiff had sent its audited statement of accounts to the defendants, the plaintiff could easily produce the said statement of accounts when asked for. Alas, the plaintiff has failed to produce its audited statement of accounts and such failure would certainly attract the provisions of s 114(g) of the Evidence Act 1950.

[15] It was submitted by the plaintiff that it had exhibited its statement of accounts. I have since had sight of the statement of accounts and it was a mere statement which merely stated that the sum of RM570,708.49 was due to the plaintiff from the defendants. That kind of statement of accounts would not be sufficient. It failed to state the details of the accounts and it did not show how the sum of RM570,708.49 was due and owing from the defendants to the plaintiff. It also failed to state and itemise the account numbers of the defendants' accounts. It was an unaudited statement of accounts. With all these infirmities, the plaintiff cannot rely on its purported statement of accounts to support its claim. In *United Malayan Banking Corp Bhd v Tan Kay Hock* [1997] 3 MLJ 813, the amount claimed for in the statement of claim did not tally with the amount owed as stated in the certificates of indebtedness. There were also no account numbers of the loans in the certificates of indebtedness and the rates of interests varied from what were set out in the statement of claim. There were discrepancies between the certificates of indebtedness and the statement of claim and because of these infirmities, the Court of Appeal held that the case was not appropriate for summary judgment.

[16] Another triable issue would be the conflicting interest rates maintained by the plaintiff. The plaintiff has claimed the sum of RM570,708.49 with interest at the rate of 2.25%pa on monthly rests with the penalty interest of 1%pa. In the letter of offer, the interest rate was stipulated at 2.25%pa on monthly rests while in the letter of demand sent by the plaintiff's solicitors, the interest demanded by the plaintiff was at 2.25% above the base lending rate on daily rests. These conflicting differences on the computation of the interest rates have not been explained by the plaintiff. It was a serious issue and it went to the root of the plaintiff's claim. In *Multi-Purpose Bank*

Bhd v Maimoon binti Abdul Razak [1999] 6 MLJ 215, the court held that the plaintiff's calculation of interest based on a factor that was not permitted by mutual consent of the parties constituted a cause to the contrary. There the defendant contended, inter alia, that the plaintiff had without her consent altered the method of computation of interest as stated in the first charge from 'per annum' basis to a 'monthly rests' basis.

[17] To confound the matter further, the plaintiff has wrongfully imposed the penalty interest at 1%pa. The plaintiff's cause of action mentioned the penalty interest at 1%pa based on the letter of offer and not the charge document. It was the contention of the defendants that the interest rate of 1%pa was based on the charge document but this contention was in direct conflict to the plaintiff's cause of action. These differences constituted a triable issue which can only be decided at the full trial.

[18] In regard to the temporary overdraft facility, the matter should proceed for trial. The plaintiff has not adduced any proof that the sum of RM100,000 was ever released to the defendants and this fact was certainly crucial to the plaintiff's claim. The plaintiff too has failed to produce its audited statement of accounts in order to show that the sum of RM100,000 was in fact credited to the defendants' accounts. It must be borne in mind that the purported statement of accounts produced by the plaintiff to show that the sum of RM570,708.49 was allegedly outstanding was not sufficient to prove that the defendants owed the plaintiff the sum of RM100,000 as alleged.

[19] It was part and parcel of my judgment that in regard to the temporary overdraft facility there was no binding contract between the plaintiff and both the defendants for the following reasons:

(1) the failure on the part of the plaintiff to produce any evidence whatsoever to show that both the defendants had ever requested for the temporary overdraft facility;

(2) that it was a pre-condition for the plaintiff to show that the temporary overdraft facility was in fact granted to both the defendants and not merely to the first defendant and that it was granted at the request of both the defendants;

(3) the plaintiff was rather vague in regard to the temporary overdraft facility because it merely stated that it was granted sometime around early 1997;

(4) the plaintiff sought to show that the temporary overdraft facility was granted to the defendants by relying on the letters dated 16 June 1997, 4 February 1998 and 15 May 1998 which were letters written by only the first defendant and not by both the defendants and these letters merely stated that the plaintiff had allegedly given a sum of RM100,000 to both the defendants;

(5) in order to succeed in its claim for the temporary overdraft facility, the plaintiff must prove that it has a cause of action against the defendants as pleaded in the

A statement of claim in that the temporary overdraft facility was granted to both the defendants at the defendants' request and that the sum of RM100,000 was in fact released to the defendants;

(6) the failure on the part of the plaintiff to show to the court what were the terms of the temporary overdraft facility;

B

(7) that there were no terms and conditions governing the temporary overdraft facility; and

(8) if the request for the alleged temporary overdraft facility was done orally, it was sufficient to merit a trial where witnesses would be called.

C

[20] The existence of factual controversies as demonstrated above cannot give rise to an O 14 judgment. It was not a clear cut case for an O 14 judgment (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 at p 185). A full trial must be ordered.

D

[21] According to the case of *Lynde v Waithman* (1895) 2AB 180, that in a case where the liquidated claim was disputed, it was not suitable for summary judgment and that unconditional leave to defend ought to be granted. In *Ochse v Duncan* (1887) 3 TLR 220, the defence raised in the affidavits showed that the defendant had not received all the articles and that the charges were excessive. The Divisional Court gave the defendant an unconditional leave to defend and on appeal by the plaintiff to the Court of Appeal, the decision of the Divisional Court was upheld. Bramwell B in the case of *Lloyd's Banking Co v Ogle* LR 1 E x D 262 at p 263 aptly said:

E

F

> The power to sign judgment was, in my opinion, intended to apply to those cases which almost on the admission of the defendant are undefended, and not to cases in which the defendant might reasonably say, 'I do not know if your case is well founded or not, but I require you to prove it'.

G

[22] The Court of Appeal in *Memphis Rogues Ltd v Skalbania* (1982) 38 BCLR 193 at p 202 aptly said:

> The question has been stated in a number of ways: Is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defense that deserves to be tried? Although cast in different terms, all point to the same inquiry, namely, is there a bona fide triable issue?

H

[23] The Federal Court in the case of *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 laid down the following principle of law:

I

> The purpose of O 14 of the Rules of the Supreme Court 1957 is to enable the plaintiff to obtain summary judgment without trial if he can prove his case clearly and if the defendant is unable to set up a bona fide defense or raise an issue against the claim which ought to be tried, final judgment should be allowed.

[24] The defendants here have succeeded and for the reasons as adumbrated above, I allowed the defendants' appeal in encl 14 with costs and I too gave an unconditional leave to defend. The plaintiff was ordered to file Form 63.

Defendant's appeal allowed.

Reported by Loo Lai Mee